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No. 91-1792

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SAMUEL A. LEWIS, ET AL.,

Petitioner,

vs.

JOHN H. ADAMSON,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Question Presented

Whether the Court of Appeal abused its discretion by declining to withhold the mandate and reopen its previous judgment on the grounds that subsequent case law purportedly eroded the basis for the previous judgment.

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No. 91-1792

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SAMUEL A. LEWIS, ET AL.,

Petitioner,

vs.

JOHN H. ADAMSON,

Respondent.

Respondent John H. Adamson respectfully prays that the Court deny the request for a writ of certiorari.

Opinion Below

The order denying the State's motion to withhold the mandate and reconsider the previous judgment is published at 955 F.2d 614 (9th Cir. 1992).

STATEMENT OF THE CASE

In 1988, an en banc panel of the Ninth Circuit decided Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988). The State's petition for certiorari from that case was denied in 1990. Sub. nom Lewis v. Adamson, 110 S.Ct. 3287 (1990). In this new certiorari proceeding, the State returns to this Court, seeking review of the circuit court's denial of its motions to withhold the mandate and reconsider the previous opinion.

A. The Previous Certiorari Proceeding.

The factual background and procedural history of this case are set out in the order below, 955 F.2d at 616, and in the prior opinions. See Adamson v. Ricketts, 865 F.2d at 1014-1016; Ricketts v. Adamson, 483 U.S. 1, 3-5 (1987).

On December 22, 1988, an en banc panel of the Ninth Circuit held, by a 7 to 4 vote,[1] that John Adamson's death sentence was unconstitutional on a number of grounds. The court held that the Arizona capital punishment system was unconstitutional, and also held that Mr. Adamson was entitled to relief on certain narrow, fact-specific claims.[2] The State of Arizona sought review of that decision on two levels.

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[1] Pursuant to Ninth Circuit Rule 35-3, an "en banc" panel in the Ninth Circuit consists of eleven judges.

[2] The court also rejected Adamson's claim that the confrontation clause was violated at trial and the claim that the automatic presumption of vindictiveness required that the conviction be set aside.

First, on January 6, 1989, the State filed a motion for rehearing in the Ninth Circuit. That motion was denied on February 1, 1989.

Second, the State filed a petition for writ of certiorari, no. 88-1553, in this Court in March of 1989. That petition was held pending the resolution of Walton v. Arizona, no. 88-7351 and Lewis v. Jeffers, no. 89-189 which involved the constitutional attacks on the Arizona statute. On June 27, 1990, Walton[3] and Jeffers[4] were decided. On the following day, certiorari was denied in no. 88-1553. Three justices indicated they would have granted the petition, vacated and remanded for further consideration in light of the Walton, Jeffers and Alabama v. Smith, 109 S.Ct. 2201 (1989). 110 S.Ct. 3287.[5]

Notably, the State did not petition for rehearing, under this Court's Rule 44, from the denial of certiorari. The State had the opportunity then to argue that recent decisions of this Court had a "substantial or controlling effect" (Rule 44.2) on the matter, but declined to do so.

B. The State's Attempts to Reopen or Vacate the Circuit's Judgment.

After certiorari was denied, the State attempted to attack the circuit's prior judgment in the lower court, initiating the proceedings that underlie this latest petition.

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[3] Walton v. Arizona, 110 S.Ct. 3047 (1990).

[4] Lewis v. Jeffers, 110 S.Ct. 3092 (1990).

[5] Justice O'Connor and Justice Kennedy took no part in the consideration of the case.

The State filed a motion to stay the mandate and a "Motion for Rehearing and Suggestion For Rehearing Before Full En Banc Court" in the circuit on July 10, 1992. The deadline for staying the mandate had passed on July 2, 1992, when the circuit received the order denying certiorari, which triggers the issuance of the mandate under Federal Rule of Appellate Procedure 41, but, due to a clerical error, the mandate had not issued when the State filed these motions. On July 16, 1990, the State filed a "Motion to Circulate Petition For Rehearing Before the Full Court." These three motions requested that the court reassess the previous decision in light of Walton, Jeffers and Alabama v. Smith, essentially adopting the position of the three justices who favored remand from the certiorari proceeding. See Appendix A to this Opposition.

While those motions were pending, in January, 1991, the State filed a "Motion to Vacate Judgment and Dismiss Appeal as Moot," on the grounds that the original plea agreement had been reactivated, and that Mr. Adamson and the State had arrived at an arrangement through which he would testify at the upcoming trial of two others. See Exhibit D to the State's Petition.

In the order issued January 30, 1992, the Ninth Circuit en banc panel, this time by a vote of 8 to 3, denied the requests of the State. The majority concluded that (1) the matter was not moot, since, although the parties had agreed that Mr. Adamson would testify, the death sentence had not yet been vacated; and (2) staying of the mandate and reconsideration of the merits was

not appropriate in this case.[6] It is the second of these conclusions that the State seeks to challenge in this Petition.

Subsequently, on February 12, 1992, the State filed yet another "Motion for Rehearing and Suggestion For Rehearing Before the Full Court" in the circuit. The entire court, composed of all active, non-recused judges, voted on whether to rehear the matter. That third motion for rehearing was denied, and the suggestion for rehearing en banc before the full court was rejected, on May 15, 1992. The May 15, 1992, order is attached to this Opposition as Appendix B.

C. Present Status of the Parties.

John Adamson and the State entered into a plea agreement in 1977, which involved an exchange of cooperation, testimony and a guilty plea for reduced charges and a sentence of years. Ricketts v. Adamson, 482 U.S. at 4. Although that agreement came unraveled under disputed circumstances, John Adamson has been willing and able to fulfill his commitment under that agreement since his obligations were clarified in 1980. See 483 U.S. at 7; 483 U.S. at 22 (dissenting opn. of Brennan, J.); Adamson v. Ricketts, 865 F.2d at 1015.

As the State noted in its motion in the Ninth Circuit:

> "On December 19, 1990, Adamson and respondents entered into a 'Stipulation and Cooperation Agreement,' which Adamson

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[6] Although the Ninth Circuit did not stay the mandate, the mandate was held during the pendency of the State's motions. In the January 30 order, the court directed that the mandate be issued and it was issued on February 18, 1992.

> attached as an exhibit to his state petition for post-conviction relief filed that same date. . . . Essentially, that agreement provides that, if Adamson testifies truthfully in the upcoming trials of Max Dunlap and James Robinson [sic], respondents will join in this motion to set aside the conviction for first degree murder, and the death penalty, and permit him to plead guilty to second degree murder, thus reactivating the original plea agreement of January 15, 1977, and his sentence under that agreement." Motion to Vacate Judgment and Dismiss Appeal as Moot, p. 2; see Petition Exhibit D.

The parties continue to abide by this agreement and pretrial proceedings in the prosecution of Dunlap and Robison are moving forward. John Adamson has been fully cooperative, has already provided many hours of testimony in pretrial depositions, and has been transferred to federal custody.[7]

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[7] The State offers no explanation for the inconsistency of its actions: it seeks reinstatement of the death sentence at this level while it has entered into an agreement for a term of years in exchange for testimony at the trial level. See Petition, p. 13.

I.

STATEMENT REGARDING JURISDICTION AND STANDARD OF REVIEW

Because the Petition is an attempt to reargue the merits of the previous certiorari proceeding years later, it is important to note the jurisdictional limits and the standard of review involved. The language of the petition asks this Court not only to rule that the circuit was wrong in declining to reassess the 1988 opinion, but also asks the Court to dictate the result of that reassessment.

Jurisdictionally, this proceeding concerns whether the circuit court of appeals abused its discretion in declining to reopen this case and stay enforcement of its decree. While the nature and legal basis of the 1988 decision may be relevant to this inquiry, the passage of time and the previous order of this Court denying certiorari limits its jurisdiction as to the merits of the 1988 decision. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418-419 (1923); see Federal Trade Commission v. Minneapolis Honeywell & Co., 344 U.S. 206, 211-213 (1952). The merits of the 1988 proceeding have been resolved; one certiorari proceeding has occurred, and there is no jurisdiction in this Court for another.

Rather, the proper method for arguing to this Court that it failed to recognize the impact of recent opinions in denying a petition for writ of certiorari is a petition for rehearing under Rule 44. The decisions of Alabama v. Smith, 109 S.Ct. 2201 (1989) and Teague v. Lane, 109 S.Ct. 1060 (1989), which the state

maintains are "controlling," could have been discussed in a rehearing petition in 1990. None was filed. Allowing the State to represent its arguments on the merits now would circumvent jurisdictional statutes and proper rehearing procedures. See Federal Trade Commission, 344 U.S. at 211-213; Iverson v. Commissioner of Internal Revenue, 257 F.2d 408, 409 (8th Cir. 1958).

In addition, the state has presented nothing to demonstrate that the Ninth Circuit's decision conflicts with any other court of appeal or that this case involves any departure from the "accepted and usual course of judicial proceedings" under Rule 10.1(a). Rather, the circuit courts are in complete agreement: the decision of a circuit court to deny or grant a motion to reopen a previous judgment is within the ambit of that court's discretion. See, e.g., Powers v. Bethlehem Steel Corp., 483 F.2d 963, 964 (1st Cir. 1973); American Iron and Steel Institute v. E.P.A., 560 F.2d 589, 592 (3rd Cir. 1977), cert. denied, 435 U.S. 914 (1978); Hines v. Royal Indemnity Company, 253 F.2d 111, 113 (6th Cir. 1958); Zipfel v. Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988), cert. denied, 110 S.Ct. 1126 (1990); Johnson v. Bechtel Association Professional Corp., 801 F.2d 412, 416 (D.C. Cir. 1986). Like the question of whether a district court should reopen its judgment under a Federal Rule of Civil Procedure 60(b) motion, the circuit court's decision regarding reopening of its judgment is entitled to a great deal of deference. See Ackermann v. United States, 340 U.S. 193, 197-198 (1950).

Two years ago this Court denied certiorari on the merits of this matter, a majority of the justices voting on the question declining to review the case. Three justices felt remand for reconsideration in light of recent opinions, including Alabama v. Smith, was necessary. No justice expressed the opinion that reversal on the merits was warranted. Despite the tardiness of the State's prompting, the circuit court assessed its arguments and objections to the final decision, declined to reopen the matter, and wrote an order carefully setting forth the reasons for its decision. In doing so, the circuit went well beyond what was necessary, in effect providing the reassessment in light of Alabama v. Smith requested by the dissenters in this Court. Yet the State still complains, and now simply asserts that it is entitled to reargue, in this Court, the legal questions it has repeatedly lost.

Even allowing for rhetorical displays, it is simply ridiculous to accuse the court below, as the State does, of acting "in disregard of this Court's authority as the supreme tribunal of this land." Petition, p. 46. No abuse of discretion is here, no conflict of federal courts and no important federal question warranting invocation of this Court's certiorari jurisdiction.

II.

THE PRESENTATION OF NEW CASE LAW DOES NOT CONSTITUTE SUFFICIENT EXCEPTIONAL CIRCUMSTANCES TO WARRANT THE EXTRAORDINARY STEP OF WITHHOLDING THE MANDATE AND REOPENING A JUDGMENT

Pursuant to procedural rule, a case in the United States Court of Appeals ends when a mandate is issued. See Federal Rule of Appellate Procedure 41; Johnson v. Bechtel Associates Professional Corp., 801 F.2d at 415. The mandate issues 21 days after the judgment, or 7 days after rehearing is denied, although it may be stayed under Rule 41 until final disposition of a petition for writ of certiorari in this Court. When an order denying the request for certiorari is transmitted to the circuit court, the mandate "shall issue immediately." Rule 41(b). No statutory or procedural basis exists for the circuit to withhold the mandate after certiorari has been denied; the issuance under Rule 41 is an automatic ministerial act. See Bryant v. Ford Motor Co., 886 F.2d 1526, 1529 (9th Cir. 1989), cert. denied, 110 S.Ct. 1156 (1990).

Nonetheless, as the court below recognized, there exists the power to withhold the mandate, reopen and reexamine the judgment. All federal courts have an inherent power to set aside a previously "final" decision. This inherent power, established in the English system "long before the foundation of our Republic" enables a court, in rare instances, to correct an injustice "deemed sufficiently gross" to demand a departure from adherence to finality. Hazel-Atlas Glass Co. v. Hartford Empire Co., 322

U.S. 238, 244 (1944). The reopening of a judgment can take many procedural forms; it is most common at the circuit level as a motion to recall the mandate and most common at the district level as a motion to set aside the judgment under Rule 60(b). See Hazel-Atlas, 322 U.S. at 245; American Iron and Steel Institute v. E.P.A., 560 F.2d at 589, 591-592; Greater Boston Television Corporation v. F.C.C., 463 F.2d 268, 275-280 (D.C. Cir. 1971).

Because of the importance of finality, however, this exceptional power must be used sparingly. Otherwise, no judgment would be immune from attack, no "settled" litigation truly final. See Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522, 525 (1931). This Court has therefore concluded that a decision to recall the mandate should only occur where continued allegiance to the previous judgment would be "manifestly unconscionable." Hazel-Atlas, 322 U.S. at 245; Hines v. Royal Indemnity, 253 F.2d at 113; see also Ackermann v. United States, 340 U.S. 193, 199 (1950) [reopening a judgment under Rule 60(b) requires "extraordinary circumstances"]. The law of the Ninth Circuit and other circuits is in accord with the requirement that only extraordinary, exceptional circumstances warrant such an action. Zipfel, 861 F.2d at 567; Dilley v. Alexander, 627 F.2d 407, 410 (D.C. Cir. 1980); Verrilli v. City of Concord, 557 F.2d 664, 665 (9th Cir. 1977); Riha v. International Tel. and Telegraph, 533 F.2d 1053, 1055 (8th Cir. 1976); Powers v.

Bethlehem Steel Corp., 483 F.2d at 964; Greater Boston Television Corporation v. F.C.C., 463 F.2d at 268, 277.

In Hazel-Atlas, this Court found such unconscionable circumstances. There, the Court found that the court of appeal's original judgment rested on "a deliberately planned and carefully executed scheme to defraud" the court. 322 U.S. at 245. Under such circumstances, this Court held, the court of appeal had not only the power but the duty to set aside its previous judgment upon conclusive proof of such fraud.

While deliberate fraud, as in Hazel-Atlas, provides an example of a situation where reopening the judgment is warranted, mere disagreement with the legal basis for the prior judgment is obviously insufficient for this extraordinary act. A claim of erroneous legal ruling is not enough to reopen a previously rendered judgment. Powers v. Bethlehem Steel Corp., 483 F.2d at 964; Hines v. Royal Indemnity Co., 253 F.2d 111, 114 (7th Cir. 1958); Iverson v. Commissioner of Internal Revenue, 257 F.2d at 409; Plotkin v. Pacific Tel. and Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982) [Rule 60(b)].

Applying these principles to this case, the State has failed to make any sufficient showing of the exceptional circumstances necessary to compel the circuit to reopen the matter. Petitioner simply argues that the court below should have reopened the judgment, and then, arguing that the court was wrong not to, leaps to the conclusion that this decision was an abuse of discretion. See, e.g., Petition at p. 23, 46. Such an approach

misconstrues the legal standard. The question is not whether the Ninth Circuit could have reopened its judgment -- the panel below clearly recognized that it had that power -- or even whether it should have. The question is whether it acted within its discretion in declining to take the extraordinary step of reopening and reconsidering a final, settled judgment.

Petitioner has not presented anything here or below remotely resembling the "deliberate fraud" type of situation of Hazel-Atlas. No new facts warranting the reopening of the judgment have been presented. Indeed, the only new facts -- the prosecution of Dunlap and Robison below with the cooperation of Mr. Adamson and the return to the plea agreement -- counsel against prolonging this litigation. Rather, the petitioner is simply arguing that the lower court should withhold the mandate and reopen the proceedings below to reconsider the issues in light of new case law. It is surely within the circuit court's discretion, having already denied one motion for rehearing and watched this Court deny certiorari, to decline that request. See Riha v. International Tel. and Telegraph, 533 F.2d at 1055; Hines, 253 F.2d at 114.

Indeed, the exercise of discretion below was considered and calm: the circuit invited briefing and, although it was not necessary to do so, set forth the reasons for its disinclination to reopen the matter. The court below recognized that the broader constitutional issues addressed in Walton and Jeffers

overruled the inconsistent language in the 1988 opinion.[8] The court below also recognized that two case-specific and narrow holdings, on the issues of judicial arbitrariness and prosecutorial vindictiveness, were unaffected by the subsequent decisions cited by the State. The State may still feel (and apparently does) that those issues were wrongly decided, but the presentation of old arguments in new guises hardly compels the extraordinary act of reopening a final decision.

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[8] Such recognition was unnecessary: the Ninth Circuit had already noted the effect of Walton and Jeffers opinion in a number of cases. See, e.g., Clark v. Ricketts, 958 F.2d 851, 859 (9th Cir. 1991); Mata v. Ricketts, 937 F.2d 467, 469 (9th Cir. 1991); Smith v. McCormick, 914 F.2d 1153, 1169-1170 (9th Cir. 1990).

III.

EVEN IF PETITIONER'S LEGAL ARGUMENTS ARE CONSIDERED, CERTIORARI IS NOT WARRANTED

The circuit court below made it clear that the subsequent cases asserted by the State as "controlling" did not dictate a change in the result. Implicitly, the court therefore indicated that, even if it agreed that the mandate should be stayed and the case reexamined, the result would be the same. In this certiorari proceeding, the State argues that the circuit below was incorrect in this assessment, that the application of Alabama v. Smith and Teague v. Lane would have altered the result below[9] and that, for some reason, certiorari is warranted to cure the situation. The State is incorrect.

A. The Subsequent Opinion of Alabama v. Smith Does Not Compel Reexamination of the 1988 En Banc Judgment.

Both the prosecutorial vindictiveness and judicial arbitrariness issues are unaffected by the Court's decision in Alabama v. Smith, 109 S.Ct. 2201 (1989). Since either of these claims alone is sufficient to require reversal of Mr. Adamson's death sentence, the State has failed completely in demonstrating that adherence to the 1988 decision is in any way "unfair."

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[9] In its July, 1990 motion for rehearing and motion to stay the mandate, the State argued that the 1988 en banc decision should be reassessed in light of three "controlling" opinions, Walton, Jeffers and Alabama v. Smith. See Appendix A to this Opposition. It was only in October 1990, after additional briefing was submitted, that the State alleged that Teague v. Lane was also "controlling." In this proceeding, the State now relies on Alabama v. Smith and Teague v. Lane.

1. Prosecutorial Vindictiveness.

Alabama v. Smith was a non-capital case where a defendant moved to withdraw his previous guilty plea and went to trial. At sentencing, the trial judge, noting new information disclosed at trial, selected a sentence in excess of the original plea bargain. This Court held that the mere fact that a defendant had successfully moved to vacate his guilty plea did not, itself, raise the automatic "presumption of vindictiveness" under North Carolina v. Pearce, 395 U.S. 711 (1969).

Smith's holding was fully consistent with the holding in the 1988 en banc Adamson decision: exactly like the court in Smith, the en banc majority found "the evidence insufficient to show that Adamson's death sentence was vindictively imposed by the sentencing judge." 865 F.2d at 1017. The Ninth Circuit's decision to reverse did not rest on the automatic presumption of vindictiveness rejected by Smith, but on "a significant possibility of actual vindictiveness surrounding the State's decision to seek the death penalty" based on the specific facts of the case. 865 F.2d at 1018-1019.[10]

This distinction was obvious to another, unanimous, panel of the Ninth Circuit in Taylor v. Kincheloe, 920 F.2d 599, 606 n.10 (9th Cir. 1990): "While Adamson involved the reinstatement of higher charges after a plea was set aside, the court's decision in that case rested on its finding that special circumstances

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[10] Smith itself reserved the question of actual vindictiveness, and remanded that issue to the Alabama Supreme Court. 109 S.Ct. at 2206-2207.

surrounding the reinstatement so strongly indicated actual vindictiveness as to raise a presumption of vindictiveness . . . The court did not hold that such a presumption is raised in all cases where the original charges are revived after a plea is vacated."

Thus, even if Alabama v. Smith were to be applied retroactively to the 1988 decision, it does not show it to be "demonstrably wrong."

2. Judicial Arbitrariness.

This question was decided in the 1989-1990 certiorari proceeding. The State specifically sought review of the judicial arbitrariness question. See Petition for Certiorari, no. 88-1553, at 19-22. That relief was denied. Three Justices, in noting that they would vacate and remand, apparently felt the Smith opinion warranted some reexamination of the circuit's conclusions. However, four Justices disagreed, and three of those four -- Justices Brennan, Blackman and Stevens -- joined the opinion of the Court in Alabama v. Smith. See 109 S.Ct. at 2202. Those justices apparently saw a sufficiently clear distinction between this case and Smith to make a remand to the circuit court unnecessary.[11] If the State thought such a conclusion was indefensible, it could have applied for rehearing

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[11] It is also noteworthy that, in the 1988 en banc opinion, five judges dissented from the majority on this issue. (Judge Boochever filed a concurrence, noting that relief was warranted on the other grounds but declining to join the judicial arbitrariness holding.) In the latest proceeding, only three of those five agreed that the Court's discretion should be exercised in favor of reopening the case in light of Smith.

under Rule 44. It did not. This latest certiorari petition merely reargues the same point.

The 1988 judicial arbitrariness decision was squarely based on the Eighth and Fourteenth Amendments. 865 F.2d at 1020. The opinion carefully distinguished the due process/ vindictiveness issue, the issue later addressed in the non-capital Smith case, in holding that the special restrictions applicable in capital sentencing were the foundation for the holding. 865 F.2d at 1017 n.3, 1020. This distinction is hardly novel. See Maynard v. Cartwright, 486 U.S. 356, 361 (1988); Turner v. Murray, 476 U.S. 25, 31 (1986).

B. The Subsequent Decision of Teague v. Lane Does Not Compel Reexamination of the 1988 En Banc Judgment.

The State's position is extraordinary: it urges this Court to hold that it is an abuse of discretion for a circuit court to refuse to reopen a pre-Teague decision granting habeas relief, apply Teague, and revoke that relief. It is not mere hyperbole to suggest that such a holding would result in a flood of requests to recall the mandates in countless cases, decided before Teague, that granted habeas relief. The adoption of the State's position would shatter any traditional notion of finality.

The State harshly attacks the Ninth Circuit for "ignoring" Teague v. Lane. Petition, p. 46. A review of the record of this litigation demonstrates, however, that it was the State that "ignored" Teague, failing to raise any retroactivity objection in a timely manner.

The en banc decision was issued on December 22, 1988, and rehearing was denied on February 1, 1989. At no time in that proceeding did the State raise any retroactivity question or attack the federal court's collateral power to address the habeas issues.

Obviously the retroactivity principles of the plurality opinion in Teague were not applied by the Ninth Circuit in 1988 because Teague had not been decided.[12] However, Teague was decided at the time the State filed its March, 1989 petition for writ of certiorari, and the State failed to raise any retroactivity objection.

During the pendency of that certiorari petition, all the cases the State now cites as Teague's "progeny"[13] were decided, and the State did not bring them to this Court's attention. Despite filing a reply brief and other supplemental authorities to the certiorari petition, the State made no mention of Teague.[14] The State had a further opportunity to argue Teague's

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[12] The Teague opinion came out on February 22, 1989. 109 S.Ct. 1060. A plurality of the Court adopted a modified version of the retroactivity doctrine previously endorsed by Justice Harlan in his opinions in Desist v. United States, 394 U.S. 244 (1969)(dissent) and Mackey v. United States, 401 U.S. 667 (1971) (separate opn.).

[13] Penry v. Lynaugh, 492 U.S. 302 (1989); Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Sawyer v. Smith, 110 S.Ct. 2822 (1990).

[14] Counsel have a duty to keep the Court apprised of "any development which may conceivably affect an outcome." Fusari v. Steinburg, 419 U.S. 379, 391 (1974)(conc. opn. of Burger, C.J.); see USSC Rule 15.7.

"controlling" nature in a rehearing petition after certiorari was denied, but did not.

Even after the certiorari proceeding concluded, in its original group of motions requesting rehearing of this case filed in July, 1990, the State did not raise Teague, but requested withholding the mandate and reconsideration in light of Walton, Jeffers and Alabama v. Smith only. See Appendix A. Again, the opportunity to raise the issue was present, again the State made no mention of Teague.

Finally, in the supplemental briefing in the circuit, in October of 1990, the State, for the first time, raised a retroactivity objection and Teague concerns. It is hardly an abuse of discretion for the circuit to decline to consider the Teague contention raised "at this late stage." 955 F.2d at 620. Various other courts have justifiably declined to address tardy Teague objections in far less egregious situations. See Williams v. Dickson, ___ F.2d ___, 1992 Westlaw 46072 (4th Cir. 1992); Thomas v. Indiana, 910 F.2d 1413, 1415-1416 (7th Cir. 1990); Falconer v. Lane, 905 F.2d 1129, 1137 (7th Cir. 1990); Hanrahan v. Green, 896 F.2d 241, 245 (7th Cir. 1990); see also Zant v. Moore, 109 S.Ct. 1519, 1520 (1989)(dis. opn. of Blackman, J.).

Ultimately, however, the State's position is absurd. Teague represented a marked departure from prior habeas law, and, with its progeny, constructed a retroactivity analysis wholly new to habeas procedure. Yet the State's position is that a federal court cannot refuse to reopen a pre-Teague case to apply Teague.

Such a holding would subject every instance of pre-Teague habeas relief to reevaluation. To set forth this argument is to demonstrate its absurdity.

CONCLUSION

In 1988, a federal court set aside John Adamson's death sentence. Since then, the State and Adamson have arrived at an understanding and the State is now prosecuting Max Dunlap and James Robison for the murder of Don Bolles, with Mr. Adamson's aid, and the parties have returned to the original plea agreement which gave Mr. Adamson a term of years. Also since then, despite the change in circumstances, the State has gone to extraordinary measures attempting to get the 1988 decision overturned.

Certainly, the State was entitled to seek rehearing and petition for certiorari from the 1988 opinion in an attempt to demonstrate that decision incorrect. It took full advantage of those avenues. It is entitled to nothing more. Yet, the circuit court gave thorough, detailed consideration to the State's request to reopen the previous decision and, in a judicious and specifically chronicled application of its discretion, declined to do so. After having once petitioned for certiorari and having filed no less than three motions for rehearing in the circuit, the State now files this petition, again asking that the 1988 opinion be overturned. In doing so, the State urges adoption of an incredible rule -- that final decisions must be reopened to apply subsequent legal developments -- cavalierly ignoring the effect of such a rule on the principles of finality and the caseload of the federal courts.

In this context, respondent notes that, in Engle v. Isaac, 456 U.S. 107, 127 (1982) and again in the recent opinion of

Coleman v. Thompson, 111 S.Ct. 2546, 2564 (1991), this Court quoted with approval the words of Justice Harlan from his dissent in Sanders v. United States, 373 U.S. 1, 24-25 (1963):

> "Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."

The circuit did not abuse its discretion in deciding that such a point has come in this case. Certiorari should be denied.

DATED this 2nd day of June, 1992.

Respectfully submitted,

BY _____

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 84-2069

JOHN HARVEY ADAMSON, Petitioner-Appellant, -vs- JAMES G. RICKETTS, et al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. CIV. 83-2323 PHX. (CAM)

MOTION FOR REHEARING AND SUGGESTION FOR REHEARING BEFORE FULL EN BANC COURT

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IN THE

UNITED STATES COURT OF APPEALS

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NO. 84-2069

JOHN HARVEY ADAMSON, Petitioner-Appellant, -vs- JAMES G. RICKETTS, et al., Respondents-Appellees.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. CIV. 83-2323 PHX. (CAM)

For reasons stated in the following memorandum, respondents respectfully petition for rehearing pursuant to Rule 40(A), Federal Rules of Appellate Procedure, and for rehearing before the full en banc Court pursuant to Rule 35-3, Rules of the Ninth Circuit.

DATED this 9th day of July, 1990.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

Jack Roberts

JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM

A petition for rehearing requires that the moving party state with particularity the points of fact or law misapprehended by the Court. Rule 40(A), Fed. R. App. P. This Court has said that subsequently issued controlling legal opinions are a valid basis upon which to seek rehearing. Armster v. United States District Court, 806 F.2d 1347, 1357 (9th Cir. 1986).

The United States Supreme Court's decisions in Walton v. Arizona, No. 88-7351 (June 27, 1990), Lewis v. Jeffers, No. 89-189 (June 27, 1990), and Alabama v. Smith, 490 U.S. ___, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (June 12, 1989), were all rendered after this Court denied rehearing February 3, 1989. These cases are controlling on every point upon which this Court ruled and call for a result contrary to that reached by the majority.

It is clear that Walton held that Arizona could constitutionally: (1) have judges determine the penalty instead of jurors; (2) place the burden of producing mitigation upon the defendant; (3) apply its especially cruel, heinous or depraved circumstance. Lewis v. Jeffers limited the authority of a federal court to review the application of an aggravating circumstance to whether any rational trier-of-fact could have found it to exist -- a standard not applied by this Court. Alabama v. Smith stated that no presumption of vindictiveness arises when the first

sentence was based upon a guilty plea, and the second sentence followed a trial -- precisely the opposite conclusion reached by the majority in this case. It makes no sense to remand for a hearing on a presumption of vindictiveness when the Supreme Court has said no such presumption arises when the heavier sentence follows a trial and the first sentence was based upon a guilty plea.

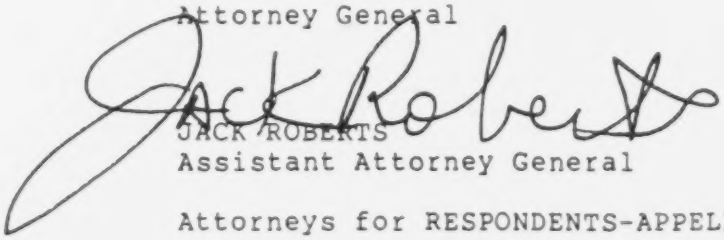
The Court will also recall the 6-5 split upon the issue of alleged arbitrary sentencing to death by the same trial court that earlier sentenced Adamson to a term of years under the plea agreement.

Since subsequent controlling legal authority plainly contradicts this Court's conclusions in this case, this Court, out of a sense of fairness and the orderly administration of justice, ought to grant a rehearing before the full en banc Court and reverse the decision of December 1988.

DATED this 9th day of July, 1990.

Respectfully submitted,

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CR26-157/4048D/dr1 (M)

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 15 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOHN HARVEY ADAMSON,

Petitioner-Appellant,

v.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, et al.,

Respondents-Appellees.

No. 84-2069

D.C. No. CV-83-2323-PHX

ORDER

Appeal from the United States District Court
for the District of Arizona

Before: HUG, SCHROEDER, PREGERSON, ALARCON, FERGUSON, D.W. NELSON, BOOCHEVER, NORRIS, BEEZER, BRUNETTI, and THOMPSON, Circuit Judges.

A majority of the judges on the panel have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc before the full court.

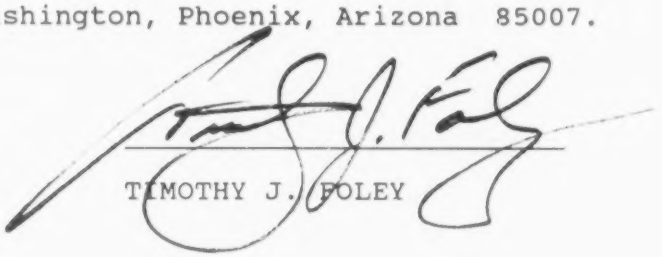
The full court was advised of the suggestion for rehearing en banc before the full court, and an active judge requested a vote on whether to rehear the matter. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of full court en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc before the full court is rejected.

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

I, Timothy J. Foley, a member of the Bar of this Court, hereby certify that on June 2, 1992, a copy of this Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed, first-class postage prepaid, to: Jack Roberts, Assistant Attorney General of the State of Arizona, 1275 W. Washington, Phoenix, Arizona 85007.



TIMOTHY J. FOLEY